

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554**

In the Matter of

Cbeyond, Inc., Petition for Expedited
Rulemaking to Require Unbundling of Hybrid,
FTTH, and FTTC Loops Pursuant to 47 U.S.C.
§ 251(c)(3) of the Act

WC Docket No. 09-223

**OPPOSITION OF AT&T INC. TO CBeyond's
PETITION FOR EXPEDITED RULEMAKING**

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INTRODUCTION AND SUMMARY

The Commission's decision not to require unbundling of broadband facilities, and fiber loops in particular, has been a resounding success. Following years of litigation, the Commission and the courts concluded that such unbundling could not be justified under the Act given growing broadband competition, the fact that competitors are similarly situated to incumbents in their ability to deploy fiber, and, most importantly, that unbundling would stifle the incentives of both incumbent and competitive carriers to invest in advanced technologies. The Commission further concluded that refraining from unbundling would stimulate facilities-based deployment of next generation broadband facilities and services by incumbents and competitors alike. These expectations have been more than met, as AT&T and other incumbent and competitive carriers have invested heavily in fiber and other wireline and wireless broadband technologies, further increasing broadband adoption and competition.

Cbeyond's petition for a rulemaking to require fiber unbundling would have the Commission revisit these determinations, but there is no factual or legal basis for doing so. At bottom, the petition is merely an attempt to promote Cbeyond's own narrow business model – one that involves minimal investment – at the expense of the Commission's broader goal of achieving ubiquitous broadband coverage. The petition rests on the claim that the Commission's premise for eliminating broadband unbundling “appears to have been false,” and that unbundling and high-levels of private investment can peacefully coexist. But Cbeyond offers no credible support for this uneconomic assertion, which the courts have repeatedly rejected, and which recent experience in the U.S. and abroad has proven false, as numerous academic studies have found. AT&T and other incumbent carriers have invested heavily in fiber with the expectation that such facilities would not be subject to unbundling, and massive investment by other wireline

and wireless competitors has followed. But far more investment (as much as \$350 billion, as the Commission itself has acknowledged, much of which will have to come from private sources) still will be necessary to meet Congressional broadband objectives. That investment will not occur if incumbent carriers are forced to bear all the risks and share all the fruits of their investments. For the Commission to revisit its policies now, just as they have begun to bear fruit, would threaten to snatch defeat from the jaws of victory.

Beyond the fact that there is no basis to revisit the Commission's broadband unbundling policies, Cbeyond's petition fails on its own terms. As an initial matter, Cbeyond's petition is incoherent. Although cast as a request "to require unbundling of hybrid, FTTH, and FTTC loops," what Cbeyond seeks is neither a loop (nor a part of a loop), nor any existing network element for that matter. What Cbeyond appears to seek instead is an entirely new (yet vaguely defined) end-to-end service that would enable Cbeyond, with minimal investment, to use AT&T's fiber network at very low (yet vaguely defined) rates. As Cbeyond concedes, however, this new service is not necessary for Cbeyond to provide services to customers at the 6-10 Mbps speeds it desires, which Cbeyond can already do using unbundled DS-1 and/or DS-3 loops. According to Cbeyond, these existing alternatives are simply "too expensive." But as the Commission and the courts have repeatedly held, the mere fact that further unbundling might reduce the costs of entry for some competitors is not a valid basis for imposing such regulation.

Cbeyond's request for additional "unbundling" also does not come close to meeting the "impairment" standard. Despite criticizing existing unbundled elements as too expensive, Cbeyond's petition indicates that it is already serving over 46,000 small-business customers – achieving "substantial market share, up to approximately 15 percent of businesses" – using just such alternatives. Although that fact alone is fatal to its petition, Cbeyond is just one of many

competitors that AT&T faces. In particular, cable companies are now aggressively competing for the same small business customers that Cbeyond purports to serve, as are fixed wireless providers and other traditional competitive carriers.

Even if Cbeyond could somehow show some level of impairment, which it cannot, its request must still be rejected because it would impose significant costs while offering no public interest benefits. As a result of the Commission's decision not to require unbundling of fiber and broadband facilities generally, fiber deployment in the United States is exploding, as is the deployment of alternative wireline and wireless broadband technologies. This private investment is critical to achieving the Commission's goal of achieving ubiquitous broadband, and any attempts to alter the rules of the game at this key juncture threatens to undermine this ongoing investment. The Commission is now facing a number of important issues with respect to the National Broadband Plan; it should not let Cbeyond's self-serving and meritless petition interfere with this broader national objective.

I. THE COMMISSION'S DECISION NOT TO REQUIRE UNBUNDLING OF FIBER LOOPS AND BROADBAND FACILITIES HAS BEEN A SUCCESS; THERE IS NO BASIS TO REVISIT THESE POLICIES

The Commission's decision not to require unbundled access to broadband facilities, including most of the capabilities of hybrid, fiber-to-the-home ("FTTH"), and fiber-to-the-curb ("FTTC") loops, has been one of the Commission's major success stories of the past decade. This policy was based on findings that facilities-based competition was emerging, that incumbents and competitors were equally positioned to deploy fiber, and that a regulatory environment in which broadband providers were free to invest and innovate without the danger of free-riding by competitors was preferable to the uncertainty and heavy burdens associated with unbundling. The D.C. Circuit upheld the Commission's decision, and recent empirical

evidence confirms that the Commission's expectations were correct. Numerous academic studies show that elimination of unbundling has enabled both incumbents and competitors to invest substantial amounts of capital in the development of next-generation broadband networks. Cbeyond's claims to the contrary, which are based upon a single, deeply flawed study, are unavailing.

A. The Commission's Decision Not to Require Unbundling of Fiber Loops was Intended to Remove Barriers to Investment and Promote Fiber Deployment

Under § 251 of the Telecommunications Act of 1996,¹ the Commission may order incumbent local exchange carriers ("LECs") to provide any requesting telecommunications carrier "nondiscriminatory access to network elements on an unbundled basis" only when, at a minimum, "failure to provide access to such network elements would impair the ability of the telecommunications carrier seeking access to provide the services that it seeks to offer."² After examining an extensive record developed over a period of more than two years, the Commission, in the *Triennial Review Order*,³ declined to require incumbent LECs to provide unbundled access to most of the broadband capabilities of next-generation fiber and hybrid loops, finding that competitors would not be impaired without such access.⁴

¹ Pub. L. No. 104-104, 110 Stat. 56 (1996) (codified at 47 U.S.C. § 151 *et seq.* (2006)).

² 47 U.S.C. §§ 251(c)(3), 251(d)(2)(B); *see also AT&T Corp. v. Iowa Utils. Bd.*, 525 U.S. 366, 391-92 (1999) (stating that § 251 "requires the Commission to determine on a rational basis *which* network elements must be made available, taking into account the objectives of the Act and giving some substance to the 'necessary' and 'impair' requirements.").

³ *In re Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, Report and Order and Order on Remand ("*Triennial Review Order*"), 18 FCC Rcd 16978 (2003), *subsequent history omitted*.

⁴ *See id.* ¶¶ 286, 291 (finding that competitive LECs are impaired without unbundled access to incumbents' hybrid loops but that this impairment "at least partially diminishes with the increasing deployment of fiber" and that "unbundled access to incumbent LEC copper subloops adequately addresses the impairment competitive LECs face so that intrusive unbundling requirements on incumbent LEC packetized fiber loops facilities is not necessary"); *id.* ¶ 273

The Commission also found that precluding unbundled access to the packet-based networks and associated fiber transmission facilities of incumbents would promote its policy directive to encourage broadband deployment⁵ in two ways: First, it would reduce the costs associated with rolling out fiber for incumbent LECs, ensuring that incumbents had the incentive to invest.⁶ According to the Commission, “with the certainty that their fiber optic and packet-based networks will remain free of unbundling requirements, incumbent LECs will have the opportunity to expand their deployment of these networks, enter new lines of business, and reap the rewards of delivering broadband services to the mass market.”⁷ Second, the Commission determined that denying access would also stimulate competitive carriers’ deployment of next-generation networks.⁸ The Commission stated that “with the knowledge that incumbent LEC next-generation networks will not be available on an unbundled basis, competitive LECs will need to continue to seek innovative network access options to serve end users and to fully

(“We conclude that requesting carriers are not impaired without access to [fiber] loops”); *see also Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, Order on Reconsideration, 19 FCC Rcd 20293, ¶ 15 (2004) (eliminating unbundling of FTTC loops because “the costs of unbundling hinder deployment of FTTC loops that otherwise would occur”).

⁵ *See Triennial Review Order* ¶ 213 (noting that the Commission is “charged with determining the potential impact of [its] rules on advanced services, including those supported by broadband deployment and infrastructure investment, as directed by section 706 of the 1996 Act”); *see also* 47 U.S.C. § 157 note (“The Commission . . . shall encourage the deployment . . . of advanced telecommunications capability . . . [by] remov[ing] barriers to infrastructure investment.”).

⁶ *See Triennial Review Order* ¶ 290 (stating that limiting “access to the (in many cases) newly deployed fiber transmission facility . . . gives incumbent LECs an incentive to deploy fiber (and associated next-generation network equipment, such as packet switches and DLC systems) and develop new broadband offerings for mass market consumers free of any unbundling requirements”).

⁷ *Id.* ¶ 272.

⁸ *See id.* ¶ 290 (“Because competitive LECs will not have unbundled access to the packet-based networks of incumbent LECs, they will need to continue to seek innovative access options, including the deployment of their own facilities necessary for providing broadband services to the mass market.”).

compete against incumbent LECs in the mass market.”⁹ For these reasons, the Commission concluded pursuant to its “at a minimum” authority under § 251 that, even if some degree of impairment exists, unbundling regulations would impose significant impediments to infrastructure investment and that this cost would outweigh any potential benefits such regulations might have on competition.

The courts have upheld the Commission’s decision not to require unbundling of broadband facilities, and fiber loops in particular. In *United States Telecom Association v. FCC*,¹⁰ the D.C. Circuit upheld the Commission’s decision not to require unbundled access to incumbents’ next-generation fiber loops.¹¹ Competitors argued that they were impaired without access to the broadband capabilities of these loops, and that the Commission is obligated under the Act to unbundle all elements for which impairment has been shown.¹² The Court disagreed, stating that § 251 allows the Commission to “withhold unbundling orders, even in the face of some impairment, where such unbundling would pose excessive impediments to infrastructure investment.”¹³ In fact, the D.C. Circuit had previously faulted the Commission for failing to account for the principle that “[e]ach unbundling of an element imposes costs of its own, spreading the disincentive to invest in innovation and creating complex issues of managing shared facilities.”¹⁴

⁹ *Id.* ¶ 272.

¹⁰ 359 F.3d 554 (D.C. Cir. 2004) (“*USTA II*”).

¹¹ *See id.* at 578-84.

¹² *See id.* at 578.

¹³ *Id.* at 580.

¹⁴ *United States Telecom Ass’n v. FCC*, 290 F.3d 415, 427 (D.C. Cir. 2002) (“*USTA I*”); *see also USTA II*, 359 F.3d at 580 (“[D]enying CLECs access to ILEC broadband capabilities will stimulate *them* to seek innovative access options for broadband, including self-deployment of new facilities; unbundling, by contrast, would be likely to blunt innovation by locking the

Applying that principle, the Court determined that it was reasonable for the Commission to conclude that the costs of unbundling incumbents' broadband facilities – most importantly, “stifling investment by both ILECs and CLECs in advanced telecommunications infrastructure” – outweighed any benefits of such regulation.¹⁵ With respect to fiber loops, the Court stated that unbundling “seems likely to delay infrastructure investment, with CLECs tempted to wait for ILECs to deploy [fiber] and ILECs fearful that CLEC access would undermine the investments' potential return. Absence of unbundling, by contrast, will give all parties an incentive to take a shot at this potentially lucrative market.”¹⁶ And, with respect to hybrid loops, the Court similarly found that in declining to unbundle such loops, the Commission “reasonably concluded that such a decision might be effective in stimulating investment in all-fiber loops.”¹⁷ In addition, the Court noted the Commission's findings suggesting that any benefit associated with unbundling would be minimal, stating that any concern competitors may have is mitigated by the fact that they have unbundled access to other loop alternatives, “including copper subloops, which allow CLECs to compete in the broadband market.”¹⁸ The Court also noted that “intermodal competition in broadband, particularly from cable companies, means that, even if

CLECs into technological choices made by the ILECs.”); *cf. USTA I*, 290 F.3d at 424 (stating that the Commission's definition of “impairment” failed to account for the fact that unbundling “reduces the incentives for innovation and investment in facilities” for both incumbent and competitive LECs).

¹⁵ *USTA II* at 579; *see also id.* at 583-84.

¹⁶ *Id.* at 584.

¹⁷ *Id.* at 582; *see also id.* at 581 (“[T]he Commission rested its judgment not only on the perceived negative effect of unbundling on *ILEC* investment incentives but also on a conclusion that unbundling hybrid loops would deter *CLECs* themselves from investing in deploying their own facilities, possibly using different technology.”).

¹⁸ *Id.* at 580.

CLECs proved unable to compete with ILECs in the broadband market, there would still be vigorous competition from other sources.”¹⁹

B. Recent Experience Confirms that the Commission’s Expectations Regarding the Unbundling of Fiber Loops Have Been Met or Exceeded

In the time since these determinations, the Commission’s expectations in eschewing broadband unbundling have been met or exceeded. As AT&T has demonstrated extensively elsewhere, incumbent LECs have invested billions of dollars to deploy fiber, while competitive carriers have extensively deployed other wireline and wireless broadband technologies.²⁰ Broadband penetration, adoption, and competition have all increased considerably, and innovation across the broadband ecosystem has thrived.

Today, wireline broadband is available to more than 90 percent of U.S. households.²¹ Since the time of the *Triennial Review Order*, wireline broadband penetration has nearly tripled, from 23 percent to 66 percent of households.²² According to the Commission’s data, the number

¹⁹ *Id.*

²⁰ See, e.g., Comments of AT&T Inc. at vii-viii, 79, *A National Broadband Plan for Our Future*, GN Docket No. 09-51 (FCC filed June 8, 2009) (“AT&T Comments, *National Broadband Plan*”); Comments of AT&T Inc. on Berkman Center Report at 28-29, *International Comparison and Consumer Survey Requirements in the Broadband Data Improvement Act*, GN Docket No. 09-47 et al. (FCC filed Nov. 16, 2009) (“AT&T Berkman Comments”); Comments of AT&T Inc., *Preserving the Open Internet; Broadband Industry Practices*, GN Docket No. 09-191, WC Docket No. 07-52 (FCC filed Jan. 14, 2010) (“AT&T Comments, *Preserving the Open Internet*”).

²¹ See, e.g., Robert C. Atkinson & Ivy E. Schultz, Columbia Institute For Tele-Information, *Broadband in America: Where it is and Where it is Going*, at 7-8 (Nov. 11, 2009), http://www4.gsb.columbia.edu/null/download?&exclusive=filemgr.download&file_id=7212786 (“CITI Report”).

²² See *id.* at 25-26.

of high-speed Internet lines (including both business and residential customers) increased from 23 million in 2003 to approximately 133 million in 2008, a nearly six-fold increase.²³

Fiber deployment has exhibited strong growth. Approximately 15 percent of U.S. households,²⁴ or 17.2 million homes, have access to fiber – a substantial increase from the 72,100 homes with access in 2002.²⁵ AT&T has announced plans to increase its U-verse fiber-to-the-neighborhood initiative to 30 million living units by the end of 2011,²⁶ and its global backbone network now includes over 928,000 worldwide fiber miles.²⁷ Verizon has similar plans to deploy its FTTH FiOS service to 17 million locations by 2010.²⁸ To keep pace with incumbents' investment, over 650 competitive LECs have entered the fiber market, collectively serving approximately 1.1 million customers.²⁹ Between 2003 and 2006, competitive LECs

²³ See Industry Analysis and Technology Division, Wireline Competition Bureau, *High-Speed Services for Internet Access: Status as of June 30, 2008*, tbl. 1 (July 2009).

²⁴ See FTTH Council, *North American Fiber to the Home Connections Surge Past Five Million*, <http://www.ftthcouncil.org/en/newsroom/2009/09/29/north-american-fiber-to-the-home-connections-surge-past-five-million>.

²⁵ See RVA, LLC, *North American FTTH/FTTP Status*, at 2 (Sept. 2009), <http://www.ftthcouncil.org/sites/default/files/RVAFTTHPreso092809forrelease.pdf>.

²⁶ See *CITI Report* at 15; AT&T Public Relations, *AT&T to Invest More Than \$17 Billion in 2009 to Drive Economic Growth* (Mar. 10, 2009), <http://www.att.com/gen/press-room?pid=4800&cdvn=news&newsarticleid=26597>.

²⁷ See AT&T, *AT&T's Global Networking Facts*, http://www.corp.att.com/globalnetworking/atts_global_networking_facts.html.

²⁸ See *CITI Report* at 15; Verizon Investor Relations, *Verizon to Discuss Plans to Divest Wireline Businesses in 14 States* (May 13, 2009), http://investor.verizon.com/news/20090513/20090513_transcript.pdf.

²⁹ See RVA, LLC, *Fiber-To-The-Home: North American Market Update*, at 8 (Apr. 2009), available at http://www.ftthcouncil.org/sites/default/files/RVA.FTTH_Apr09.060109.pdf.

expanded their fiber networks by approximately 71,433 route miles, and that number has continued to increase in the years since.³⁰

This expansion of broadband deployment and penetration has been made possible by substantial private investment. In 2008, major telecommunications providers invested approximately \$26 billion in broadband.³¹ In 2009 alone, AT&T devoted approximately two-thirds of its *roughly 18 billion dollar* capital expenditure budget to extending and enhancing its wireline and wireless broadband networks.³² Clearwire received a \$3.2 billion investment from Intel, Google, Comcast, Time Warner Cable, and Bright House to expand its WiMAX business,³³ and cable providers have made a similar commitment to improving their infrastructure, investing a total of \$14.6 billion in 2008³⁴ with approximately 30% of this going toward broadband.³⁵ Six competitive LECs plan to invest nearly a combined \$1 billion in 2009 and more than a combined \$1 billion in 2010.³⁶

Numerous economic studies confirm that the Commission's unbundling policies have been key to encouraging deployment and investment in broadband facilities. Economists

³⁰ Compare New Paradigm Resources Group, Inc., *Competitive Carrier Report 2007*, ch. 4, tbl. 11 (21st ed. 2007), with New Paradigm Resources Group, Inc., *CLEC Report 2003*, ch. 4, tbl. 12 (17th ed. 2003) (excluding data for AT&T and Verizon Business/WorldCom).

³¹ See *CITI Report* at 30, tbl. 5.

³² See AT&T Press Release, *AT&T to Invest More Than \$17 Billion in 2009 to Drive Economic Growth* (Mar. 10, 2009), <http://www.att.com/gen/press-room?pid=4800&cdvn=news&newsarticleid=26597>; see also Comments of AT&T Inc., *A National Broadband Plan for Our Future*, GN Docket No. 09-51 at viii, n. 13 (June 8, 2009); AT&T, *Investments*, <http://www.att.com/gen/public-affairs?pid=12903#top>.

³³ See Clearwire Corporation, Form 10-Q, at 7 (SEC filed Nov. 10, 2009).

³⁴ See National Cable and Telecommunications Association, *Cable Industry Capital Expenditures 1996 – 2009*, <http://www.ncta.com/Stats/InfrastructureExpense.aspx>.

³⁵ See *CITI Report* at 64-66.

³⁶ See Collins Stewart, LLC, *Telecom Services: Telecom Services Initiation*, at 39 (Oct. 19, 2009).

Thomas Hazlett and Jeffrey Eisenach have each found that both deployment and adoption increased in the United States after the elimination of broadband unbundling.³⁷ Harold Ware and Christian Dippon examined the competitive effects of unbundling on broadband in the United States and concluded that the “association between unbundling and increased broadband penetration is not statistically significant when relevant economic, demographic and supply determinants are included in the analysis.”³⁸ They also found that unbundling can distort investment incentives for both the facilities provider and the entrant.³⁹

Moreover, just as studies have found that unbundling has deterred broadband investment in the United States, numerous studies have reached the same conclusion with respect to unbundling in foreign countries. For example, Scott Wallsten, the current Economics Director for the FCC’s National Broadband Task Force, has analyzed the effects of unbundling regulation and found that it has a negative impact on investment in next-generation broadband infrastructure.⁴⁰ After examining data from 27 European countries, Wallsten concluded that, while different types of unbundling can have different effects, “countries that rely more on

³⁷ See, e.g., Thomas W. Hazlett & Anil Caliskan, *Natural Experiments in U.S. Broadband Regulation*, 7 Rev. Network Econ. 460 (Dec. 2008); Jeffrey A. Eisenach, The Progress & Freedom Foundation, *Broadband Policy: Does the U.S. Have It Right After All?* at 1 (Sept. 2008) (“Since 2003, when the [FCC] began jettisoning mandated unbundling and chose instead to rely on infrastructure competition, the results have been extraordinary. U.S. broadband providers are investing tens of billions annually to build out what is rapidly becoming – and in many respects already is – the most capable and competitive broadband infrastructure in the world.”).

³⁸ Harold Ware & Christian M. Dippon, NERA Economic Consulting, *Wholesale Unbundling and Intermodal Competition* at 2 (Jan. 7, 2010) (“Ware & Dippon, *Wholesale Unbundling*”).

³⁹ See *id.*

⁴⁰ See, e.g., Scott Wallsten & Stephanie Hausladen, *Net Neutrality, Unbundling, and their Effects on International Investment in Next-Generation Networks*, 8 Rev. Network Econ. 90 (March 2009) (“Wallsten & Hausladen, *Net Neutrality*”), available at http://www.techpolicyinstitute.org/files/wallsten_unbundling_march_2009.pdf; Scott Wallsten, *Broadband and Unbundling Regulations in OECD Countries*, AEI-Brookings Joint Ctr. for Reg. Stud., Working Paper 06-16 (June 2006), available at <http://aei-brookings.org/admin/authorpdfs/redirect-safely.php?fname=../pdffiles/phpSV.pdf>.

unbundled lines to provide broadband see less investment by incumbents in fiber than countries that rely less on unbundled lines and more on facilities-based entry.”⁴¹ Multiple other studies have echoed these findings.⁴²

Despite the extensive evidence of fiber deployment and a wide body of academic research linking broadband investment to the absence of unbundling, Cbeyond (at 11) claims that “the major premise underlying the Commission’s decision – that elimination of unbundling was necessary to remove disincentives to invest in next-generation broadband facilities – appears to have been false.” Cbeyond’s only support for this claim, however, is a single CLEC-sponsored paper by Economics and Technology, Inc. (“ETI”) that is deeply flawed.⁴³ According to

⁴¹ Wallsten & Hausladen, *Net Neutrality* at 102.

⁴² See, e.g., Leonard Waverman et al., *Access Regulation and Infrastructure Investment in the Telecommunications Sector: An Empirical Investigation*, LECG 3 (Sept. 2007) (Unbundling “ultimately results in substantially lower investment in these alternate access platforms.” “Our econometric analysis shows that, all else equal, a reduction of 10 percent in LLU price causes an 18 percent fall in the subscriber share of alternative infrastructure.”); Michał Grajek & Lars-Hendrik Röller, *Regulation and Investment in Network Industries: Evidence from European Telecoms*, ESMT Discussion Paper at 2-3, 18 (June 15, 2009) (“Grajek & Röller, *Regulation and Investment*”), available at <http://sfb649.wiwi.hu-berlin.de/papers/pdf/SFB649DP2009-039.pdf> (finding that access regulation negatively affects both industry and individual carrier investment, undermines incumbents’ incentives to invest in new broadband infrastructure, and discourages investment by new entrants); Carlo Cambini & Yanyan Jiang, *Broadband Investment and Regulation: A Literature Review*, 33 *Telecomms. Pol’y* 559, 569 (2009) (“[A]lthough few empirical findings support the non-negative effect of access regulation on investment, most of the evidence shows that local loop unbundling based on forward-looking cost methodology discourages both ILECs and CLECs from investing in networks.”); Robert D. Atkinson, *The Role of Competition in a National Broadband Policy*, 7 *J. Telecomm. & High Tech. L.* 1, 16-17 (2009) (“On the negative side . . . unbundling reduces incentives of incumbents to invest in larger pipes.”); Debra J. Aron & Robert W. Crandall, *Investment in Next Generation Networks and Wholesale Telecommunications Regulation* at 2 (Nov. 3, 2008), available at <http://ssrn.com/abstract=1294910> (“Empirical analyses and case studies document the damaging effects of unbundling regulations on investment in the U.S., Europe, and elsewhere.”); Jerry Hausman & J. Gregory Sidak, *Did Mandatory Unbundling Achieve Its Purpose? Empirical Evidence from Five Countries*, 1 *J. of Compet’n Law & Econ.* 173 (2005).

⁴³ See Cbeyond, Inc., *Petition for Expedited Rulemaking to Require Unbundling of Hybrid, FTTH, and FTTC Loops*, WC Docket No. 09-223, at 15-16 (FCC filed Nov. 16, 2009) (“Cbeyond Petition”) (citing Lee Selwyn et al., Economics and Technology, Inc., *The Role of*

Cbeyond, the ETI paper “reveals that incumbent LEC network investment ‘decreased sharply’ after 2001, when the FCC began pursuing its deregulatory agenda.”⁴⁴ But 2001 is not the right starting point for any such comparison; the *Triennial Review Order* was issued in 2003 and affirmed by the D.C. Circuit in 2004, and it was not until this time that AT&T and other carriers had sufficient assurance that their broadband investment would not have to be shared with competitors. ETI’s attempt to use 2001 investment levels as a benchmark also is misplaced because it is widely understood that the Internet bubble, which is generally considered to be a period of private-sector *overinvestment*, was at its peak in 2000-01.⁴⁵ That AT&T may have spent one-third less on capital expenditures “between 2002 and 2007 than it did between 1996 and 2001”⁴⁶ thus says nothing about the efficacy of the Commission’s unbundling policies; it merely reflects an efficient and necessary market correction.

According to Cbeyond, “ETI also found that between 2004 and 2007, after the FCC issued the [*Triennial Review Order*], ‘ILEC capex remained steady and increased only slightly

Regulation in a Competitive Telecom Environment: How Smart Regulation of Essential Wholesale Facilities Stimulates Investment and Promotes Competition (Mar. 2009) (“*ETI Study*”).

⁴⁴ Cbeyond Petition at 15 (quoting *ETI Study* at 28).

⁴⁵ See, e.g., Viktor Shvets & Andrew Kiely, Deutsche Bank, *RBOCs: Initiating Coverage*, at 8 (Nov. 22, 2002) (“We believe that the recent decline in capital intensity is not simply a response to the poor economic climate. Rather, it is a rational response to an indifferent revenue and earnings outlook, increasing competitive pressure, regulatory induced competition, overinvestment in the late 1990s and a lack of decisive new applications.”); *id.* at 163 (“[I]n our view, it was a massive rise in profits in late 1990s that prompted RBOCs to ove[r]estimate longer-term profitability and thus overinvest.”); Gartner, Inc., *Fixed Public Network Services, United States, 2001-2007*, at 8 (June 17, 2003) (“Beyond the sluggish general economy, the U.S. telecom market continues to face ramifications growing out of years of overexpansion, overinvestment and overcapacity. Investment has moved profoundly out of the sector and will be slow to return.”).

⁴⁶ Cbeyond Petition at 15 (citing *ETI Study* at 25).

through 2007” and “CLEC capital spending continued to decline.”⁴⁷ But this comparison – which concedes that incumbent LEC investment has *increased* – also is flawed. It ignores, in the first instance, the dramatic increase in fiber deployment and investment that occurred in 2008 and 2009.⁴⁸ It also ignores the large investment that cable companies have made in fiber and DOCSIS 3.0 technology during the past two years (as well as other prior cable investment in broadband), largely in response to incumbent LECs’ fiber deployment.⁴⁹ And it further ignores the massive investment that has been made – both in 2004-07, and in 2008-09 – in wireless broadband technologies.⁵⁰ In addition, ETI’s analysis is of little value because it looks at

⁴⁷ *Id.* (quoting *ETI Study* at 28).

⁴⁸ See, e.g., RVA LLC, *North American Market Update*, at 7 (Apr. 2009), http://www.ftthcouncil.org/sites/default/files/RVA.FTTH_.Apr09.060109.pdf (in the 18 months between September 2007 and March 2009, the number of homes passed by fiber in North America grew by nearly 60 percent, from 9.6 million homes to 15.2 million homes).

⁴⁹ See NCTA, *Cable Industry Capital Expenditures 1996-2009*, <http://www.ncta.com/Stats/InfrastructureExpense.aspx> (cable companies spent \$14.6 billion in 2008 and \$14.4 billion in 2009); *CVC – Cablevision Systems Corp. at Citi Global Entertainment, Media, and Telecommunications Conference*, Thomson StreetEvents, Final Transcript, at 7 (Jan. 6, 2010) (Cablevision has deployed DOCSIS 3.0 across its entire footprint); *Comcast Corporation at Bank of America Securities Media, Communications & Entertainment Conference – Final*, FD (Fair Disclosure) Wire, Transcript, at 19 (Sept. 9, 2009) (statement by Comcast COO Stephen Burke) (Comcast was on track to deploy DOCSIS 3.0 to 80 percent of its footprint by the end of 2009); Traci Patterson, *Cox Ups Internet Speeds, Boards ESPN360.com Train* (Sept. 24, 2009), <http://www.cedmagazine.com/News-Cox-Internet-speeds-ESPN360-092409.aspx> (Cox plans to offer DOCSIS 3.0 speeds in more than two-thirds of its systems across the country by the end of 2010); *Time Warner Cable, Inc. at Goldman Sachs Communacopia Conference New York – Final*, FD (Fair Disclosure) Wire, Transcript, at 13 (Sept. 15, 2009) (Time Warner Cable deployed DOCSIS 3.0 in New York City and will continue to make DOCSIS 3.0 available in 2010).

⁵⁰ National and regional wireless operators spent approximately \$128.5 billion upgrading networks through 3Q09, including nearly \$92.9 billion from 2004-2007 and \$35.6 billion from 2008 through the third quarter of 2009. See John Hodulik et al., UBS, *US Wireless 411*, at 47, Table 47 (Nov. 16, 2009); John Hodulik et al., UBS, *US Wireless 411*, at 50, Table 45 (June 22, 2009); John Hodulik et al., UBS, *US Wireless 411* at 51, Table 45 (Mar. 23, 2009); John Hodulik et al., UBS, *US Wireless 411*, at 48, Table 45 (Dec. 3, 2008); John Hodulik et al., UBS, *US Wireless 411*, at 46, Table 43 (Sept. 9, 2008); John Hodulik et al., UBS, *US Wireless 411*, at 48, Table 43 (June 3, 2008); John Hodulik et al., UBS, *US Wireless 411*, at 67, Table 50 (Mar. 19,

incumbent LEC capital spending as whole, and does not separately track investment in broadband.

In sum, the factual circumstances underlying the Commission's decision to reject unbundling of fiber loops have not changed. Rather, the empirical evidence and the myriad economic studies published since the Commission adopted its unbundling policies support the Commission's decision not to require incumbent LECs to provide unbundled access to fiber. Cbeyond's invitation for the Commission to reverse course should be rejected on this basis alone.

II. THERE IS NO LEGAL BASIS FOR THE "UNBUNDLING" CBeyond REQUESTS, WHICH DOES NOT COME CLOSE TO MEETING THE IMPAIRMENT STANDARD

The Commission should also reject Cbeyond's petition because there is no legal basis to adopt the relief that it seeks. Despite how its petition is framed, Cbeyond is not seeking access to unbundled fiber loops, but instead wants an entirely new end-to-end service that would enable Cbeyond, with minimal investment, to use AT&T's fiber network at rates presumably even below TELRIC. There is no basis to grant such relief. Moreover, even on its own terms, Cbeyond's request does not come close to meeting the statutory impairment standard.

A. Cbeyond's petition is titled a "Petition for Expedited Rulemaking to Require Unbundling of Hybrid, FTTH, and FTTC loops," but this is misleading. Three-quarters of the way through the petition, Cbeyond for the first time explains that what it seeks is neither an unbundled loop nor, as the first page of its petition claims, even just "the packetized bandwidth" of a loop, but instead "a high-bandwidth connection, between 6 and 10 Mbps" over a "bit stream

2007). CITI reports wireless broadband capex of \$10.35 billion in 2008 and estimates \$11.833 billion in 2009, as well as nearly an additional \$400 million each year in satellite and WISP broadband. See *CITI Report* at 66, Table 15.

transmission path from the small business end user to a central aggregation point in the incumbent LEC's network in the LATA, at which point the competitor could pick up the bit stream and carry it back to its network."⁵¹ Cbeyond requests that such end-to-end access be supplied not at UNE rates – which it argues are “too expensive” – but instead “at the lowest retail price offered by the incumbent LEC in the relevant MSA.”⁵² By its terms, therefore, what Cbeyond's petition seeks is not access to unbundled loops,⁵³ but an entirely new (yet vaguely defined) end-to-end service that would enable Cbeyond, with minimal investment, to use AT&T's fiber network at very low (yet vaguely defined) rates. The Act provides no basis for the Commission to establish such an offering.

B. Even treating Cbeyond's petition on its own terms, as a request for unbundling of fiber loops, it fails because Cbeyond does not come close to meeting the impairment standard. The Commission has made “impairment” the touchstone of § 251,⁵⁴ and has stated that a carrier's ability to provide service is “impaired” only in the limited circumstances in which “lack of access to [an] element poses a barrier or barriers to entry . . . that are likely to make entry into a market by a reasonably efficient competitor uneconomic.”⁵⁵ This does not mean, however, that unbundling is proper in any situation in which a new entrant faces higher costs or does not enjoy

⁵¹ Cbeyond Petition at 21-22.

⁵² *Id.* at 21.

⁵³ A loop is defined as “a transmission facility between a distribution frame (or its equivalent) in an incumbent LEC central office and the loop demarcation point at an end-user customer premises.” 47 C.F.R. § 51.319(a). What Cbeyond seeks is partial access to a facility that runs from an end-user customer premises to some unspecified single point of interconnection in a LATA.

⁵⁴ *See USTA I*, 290 F.3d at 425.

⁵⁵ 47 C.F.R. § 51.317(b).

economies of scale.⁵⁶ Rather, the Commission will consider implementing unbundling only in those cases in which cost disparity is “linked (in some degree) to natural monopoly,” making “genuinely competitive provision of an element’s function wasteful.”⁵⁷

This standard is not remotely met here. To the contrary, as AT&T has demonstrated above,⁵⁸ the provision of broadband is characterized by robust and growing competition. This is true not only as a general matter, but also with respect to the small business customers that Cbeyond purportedly seeks to serve. Cbeyond has made no effort to show that AT&T or any other incumbent carrier has “natural monopoly” advantages in providing broadband services to small business customers; in fact, it (at 13) claims the opposite, arguing that incumbent LECs “have [not] used the capacity in their loop plants to cater to small businesses.” AT&T does in fact offer a full range of broadband and other services to small business customers, a market segment it values highly, and it faces extensive competition in the provision of these services. Despite Cbeyond’s claim to the contrary, AT&T touches millions of small businesses several times a year through a variety of marketing efforts including dedicated sales professionals, telemarketing and direct mail, and AT&T faces extensive competition in the provision of services to this market from an array of intra- and inter-modal competitors.

As an initial matter, Cbeyond’s own petition confirms that traditional competitive LECs like itself are competing successfully without the additional unbundling that Cbeyond now seeks.

⁵⁶ See *USTA I*, 290 F.3d at 427; see also *Iowa Utils. Bd.*, 525 U.S. at 389-90 (“[T]he [Commission]’s assumption that *any* increase in cost (or decrease in quality) imposed by denial of a network element renders access to that element ‘necessary’ and causes the failure to provide that element to ‘impair’ the entrant’s ability to furnish its desired services, is simply not in accord with the ordinary and fair meaning of those terms.”).

⁵⁷ See *USTA I*, 290 F.3d at 427.

⁵⁸ See *supra* n.20 (AT&T Comments, *National Broadband Plan* at vii-viii, 79; AT&T Berkman Comments at 28-29).

Cbeyond states that it “provides IP-based applications and managed services via T-1 loops to more than 46,000 small businesses . . . in 12 markets throughout the United States,”⁵⁹ and has “been able to achieve substantial market share, up to approximately 15 percent of businesses with between 5 and 250 employees in mature markets by offering services exclusively via T-1 loops.”⁶⁰ Cbeyond also boasts that its services have been so successful that “its rate of churn to incumbent LECs and cable operators has been low across markets.”⁶¹ On these facts alone, there is no basis for a finding that Cbeyond (or any other competitor) is impaired without further unbundling.

Moreover, Cbeyond is just one of many competitors serving small business customers that AT&T faces.⁶² Cable companies have begun aggressively competing for these same customers, having upgraded and expanded their networks and specifically targeting small- and medium-sized business customers with a suite of services and Internet offerings. For example, Comcast is targeting small business customers aggressively, and has recently launched a 100 Mbps service for such customers.⁶³ The company’s CEO, Brian Roberts, recently told Wall Street analysts that the company’s targeting of small businesses “has come on like gangbusters, and there’s nothing but blue sky right now for our small/medium-size business. It’s a big

⁵⁹ Declaration of Brooks Robinson on Behalf of Cbeyond Inc., ¶ 2 (Attach. A to Cbeyond Petition) (“Robinson Decl.”).

⁶⁰ Cbeyond Petition at 16-17.

⁶¹ Robinson Decl. ¶ 3.

⁶² Cf. Ware & Dippon, *Wholesale Unbundling* at 17 (“[F]acilities based competition from mobile wireless and cable voice providers, rather than UNE-based entry, is the predominant source of competition faced by US ILECs.”).

⁶³ See Comcast, *Internet vs. Verizon, Qwest and AT&T*, <http://www.comcast.com/MediaLibrary/1/1/Business/CompetitiveMatrix.pdf>; Comcast Press Release, *Comcast Launches 100 Mbps High-Speed Internet Service for Businesses in the Twin Cities* (Sept. 8, 2009), <http://www.comcast.com/About/PressRelease/PressReleaseDetail.ashx?PRID=918>.

percentage of our EBITDA growth. It's growing incredibly well. It's one of the businesses that is a little bit counter – part of it, anyway, is counter to the economy. It's a good value to businesses, and they can convert and save money.”⁶⁴ Time Warner offers a full complement of business communications tools to small businesses and today serves more than 280,000 business customers.⁶⁵ And Cox offers a full range of bandwidths and prices to fit the specific needs of small and large businesses alike.⁶⁶

In addition, since the time of the *Triennial Review Order* fixed wireless also has emerged as a major competitive alternative, including for small business customers. Providers such as Towerstream, Covad Wireless, Airband, Rapid Link, Business Only Broadband, and Sparkplug all state that they are serving this market segment.⁶⁷ Furthermore, the deployment of 3G and 4G technologies has greatly increased the cross-platform competition between wireless and wireline broadband. In sum, none of the “natural monopoly” preconditions for unbundling exist, and all evidence points to significant and growing competition.⁶⁸

⁶⁴ *Comcast Corp. at Citi Global Entertainment, Media, and Telecommunications Conference*, FD (Fair Disclosure) Wire, Transcript at 6 (Jan. 6, 2010) (statement of Brian Roberts, CEO, Comcast).

⁶⁵ See Time Warner Cable Business Class, *About Us*, <http://www.twcbc.com/Corporate/AboutUs/default.html>.

⁶⁶ See Cox, *Cox Business Internet*, http://ww2.cox.com/wcm/en/business/datasheet/ds-business-internet.pdf?campcode=xl_data_0908.

⁶⁷ See Towerstream Press Release, *Towerstream Presented With Two Telephony Innovation Awards at Telephony LIVE* (Oct 2, 2008), <http://ir.towerstream.com/releasedetail.cfm?ReleaseID=338113>; Covad Wireless, *About Covad Wireless*, <http://www.covadwireless.com/about.html>; Airband Communications, *Small Business Internet Phoenix*, <http://www.airband.com/phoenix/small-business-internet-phoenix/>; Rapid Link, *Commercial High Speed Data & Voice*, <http://www.rapidlink.com/commercial.cfm>; Business Only Broadband, *Market Segments: Small Business*, http://www.bobbroadband.com/small_business.php; Sparkplug Communications, *The Sparkplug Advantage*, <http://www.sparkplug.net/>.

⁶⁸ See *Triennial Review Order* ¶ 275 (stating that in certain circumstances “incumbent LECs do not have a first-mover advantage that would compound any barriers to entry”).

C. Unable to prove that the level of competition for small business customers as a whole demonstrates impairment, Cbeyond argues that it is impaired with respect to the specific manner in which it seeks to provide service. It claims, for example, that existing unbundled loop alternatives are either “too expensive” or do not provide sufficient bandwidth for the services it seeks to offer.⁶⁹ Even apart from the robust competition evident in the marketplace, both arguments are wide of the mark.

As to cost, it begs incredulity to suggest that TELRIC rates – which competitive LECs defended tooth-and-nail, and which the Supreme Court has described as just short of confiscatory⁷⁰ – are too high. In any event, the Supreme Court has held that it cannot be the case that impairment results from “*any* increase in cost (or decrease in quality) imposed by denial of a network element.”⁷¹ Cbeyond’s attempt to argue that existing unbundled loops are too expensive also further exposes its petition as merely an attempt to get a significant price break on facilities that are already available, which the courts and the Commission have likewise rejected as a basis for an impairment finding.⁷² In a transparent effort to make its request more palatable, Cbeyond argues that the new service it seeks need not be provided at the TELRIC rates the Commission has adopted pursuant to § 252(d)(1), but instead should be offered at “the lowest retail price offered by the incumbent LEC in the relevant MSA.”⁷³ But, as Cbeyond is undoubtedly aware, neither AT&T nor to its knowledge any other incumbent LEC currently provides at retail the 6-

⁶⁹ Cbeyond Petition at 18; *see also id.* at 14.

⁷⁰ *See Verizon Commc’ns, Inc. v. FCC*, 535 U.S. 467 (2002).

⁷¹ *Iowa Utils. Bd.*, 525 U.S. at 389.

⁷² *See, e.g., id.* at 390 n.11 (stating that a business is not impaired when it “receives a handsome profit but is denied an even handsomer one”); *Triennial Review Order* ¶ 112 (“We reject the proposal to find impairment whenever entrants would suffer from a substantial cost disadvantage . . . , regardless of whether entry is still possible.”).

⁷³ Cbeyond Petition at 21.

10-Mbps-bit-stream-transmission-path-to-a-single-point-in-a-LATA offering that Cbeyond describes. Cbeyond's agenda therefore appears to involve the creation of a new regulated rate, derived from the retail prices of lower priced services, such as AT&T's U-Verse or other incumbent's mass-market fiber services.⁷⁴ There is no basis under the Act for the Commission to take any such approach.

There is likewise no merit to Cbeyond's claim (at 18) that existing high-capacity loops are inadequate to meet its needs "because the applications [it seeks to provide] require much more bandwidth" than such loops possess. The Commission has made clear that the availability of loop alternatives within the networks of incumbent LECs – including copper subloops and TDM-based DS-1 and DS-3 loops – can "adequately address[]" any impairment competitive LECs may face such that "intrusive unbundling requirements on incumbent LEC packetized fiber loop[] facilities is not necessary."⁷⁵ In fact, the unbundled loops that are already available to Cbeyond give it even *greater* capacity than the new 6-10 Mbps service it is now seeking. A DS-3 loop, for example, offers 44.7 Mbps of capacity, which is many times the amount that Cbeyond supposedly needs. Cbeyond also could obtain multiple DS-1 loops at a given location.⁷⁶

⁷⁴ Cf. Comments of Sprint Nextel Corp., at 23-24, *Special Access Rates for Price Cap Local Exchange Carriers*, WC Docket No. 05-25 (Aug. 8, 2007) (arguing that the price of a DS-1 special access circuit should be in line with mass-market DSL prices).

⁷⁵ *Triennial Review Order* ¶¶ 291, 294. See also *USTA II*, 359 F.3d at 582 ("With regard to loop alternatives, we agree with the CLECs that these alternatives are not a perfect substitute for the ILECs' hybrid loops," but that, as the Commission found, "they will mitigate, not eliminate, CLEC impairment.")

⁷⁶ In addition, Cbeyond could use an unbundled basic copper loop to provide Ethernet-over-Copper services that are capable of speeds of up to 45 Mbps. Cbeyond argues that such technology is available only for "loops that are 15,000 feet or less," and that only a small percentage of incumbent loops meet that criterion. Again, there is no merit to this claim. Technology is available from vendors such as Actelis Networks, whose "product family utilizes the existing copper infrastructure to deliver high-quality, high-speed Ethernet or TDM/ATM broadband services to customers' locations even beyond 18,000 feet (5.5km)." Actelis Networks, *Corporate Profile*, at 2, http://actelis.net/library/BRO_Corporate.pdf.

Cbeyond does not address this obvious problem with its request, other than to say (at 18) that “DS3 loops are too expensive to serve as a viable substitute.” This further proves, however, that Cbeyond does not, contrary to what it claims, need the added capacity that fiber loops offer; it simply wants a cheaper way to obtain that capacity, which is not a basis for a finding of impairment.⁷⁷

III. FIBER UNBUNDLING WOULD IMPOSE SIGNIFICANT COSTS AND NO BENEFITS

Even if Cbeyond could somehow show some level of impairment, which it cannot, its petition also must be rejected under the “at a minimum” provision of § 251 because it would impose significant costs – deterring private investment in fiber at a critical juncture when deployment, which is key to the Commission’s National Broadband Plan, is exploding – while offering no public interest benefits in return. The Commission,⁷⁸ courts,⁷⁹ and noted economists⁸⁰ have all recognized that an inescapable negative consequence of unbundling is that it deters investment. And it is equally well understood that the investment-detering effects of unbundling are particularly acute when such regulation is imposed on brand-new infrastructure,

⁷⁷ Indeed, Cbeyond’s petition is framed broadly enough to encompass not only FTTH, FTTC, and hybrid-fiber loops, but virtually all DS-1 and DS-3 facilities as well, which Cbeyond simply wants to obtain at a lower price. Because the service that Cbeyond is seeking involves transport – which is virtually always provided over fiber – as well as a loop, the facilities over which DS-1 or DS-3 loops and transport are typically provided would meet Cbeyond’s definition of a hybrid-fiber loop.

⁷⁸ See *Triennial Review Order* ¶ 272 (“We expect that th[e] decision to refrain from unbundling incumbent LEC next-generation networks . . . will stimulate facilities-based deployment.”).

⁷⁹ See *USTA I*, 290 F.3d at 427 (“Each unbundling of an element imposes costs of its own, spreading the disincentive to invest in innovation and creating complex issues of managing shared facilities.”); see also *Iowa Utils. Bd.*, 525 U.S. at 428-29 (Breyer, J., concurring in part and dissenting in part).

⁸⁰ See, e.g., Grajek & Röller, *Regulation and Investment* at 2 (finding that access regulation “negatively affect[s] both total industry and individual carrier investment” and that “promoting market entry by means of regulated access undermines incentives to invest in facilities-based competition”).

such as the fiber to which Cbeyond now seeks access.⁸¹ As demonstrated in Part I above, the experience in the United States bears all of this out, as investment in broadband generally, and fiber in particular, has steadily increased since the Commission's decision not to subject such facilities to burdensome unbundling regulation.

Cbeyond has no answer to the fact that the experience in the United States – which is home to more private fiber investment than anywhere else in the world – demonstrates that further unbundling would have disastrous consequences. It instead (at 22) claims that the “the experience of other countries” indicates that fiber unbundling “would result in net public interest benefits.” In support, it cites the report published by the Berkman Center for Internet and Society.⁸² As AT&T and others have previously demonstrated at length, however, the Berkman Study is critically flawed in numerous respects, and when these flaws are corrected they show just the opposite of what Cbeyond claims.⁸³ Cbeyond places particularly heavy reliance on the

⁸¹ See, e.g., Comments of AT&T Inc. at 103-104, 135, *Inquiry Concerning the Deployment of Advanced Telecommunications Capability to All Americans in a Reasonable and Timely Fashion, and Possible Steps To Accelerate Such Deployment Pursuant to Section 706 of the Telecommunications Act of 1996, As Amended by the Broadband Data Improvement Act*, GN Docket No. 09-137 (FCC filed Sept. 4, 2009); AT&T Comments, *Preserving the Open Internet* at 83-85, 143-45.

⁸² See Berkman Center for Internet & Society, *Next Generation Connectivity: A Review of Broadband Transitions and Policy From Around the World* (Oct. 2009) (“Berkman Report”), available at http://www.fcc.gov/stage/pdf/Berkman_Center_Broadband_Study_13Oct09.pdf.

⁸³ See AT&T Berkman Comments. As AT&T has explained, even accepting its conclusions at face value, the Berkman paper does not demonstrate that unbundling has played a positive role in fiber deployment, but at most suggests that “open access” policies – unbundling, bitstream access, collocation requirements, wholesaling, and/or functional separation – have played a role in certain countries first generation transition to DSL. See *id.* at 11. The report does not even purport to show that the unbundling of fiber has yielded benefits in other countries and, as outlined above, an overwhelming number of studies reach the contrary conclusion. In fact, the Berkman study itself supports the claim that unbundling fiber can negatively affect both investment and competition, as it concedes that the Commission’s “theory” that unbundling would reduce investment incentives was “not an unreasonable idea.” Berkman Report at 82.

Berkman paper's discussion of Japan,⁸⁴ where fiber deployment has been heavily subsidized by the government and therefore is a particularly poor case study. Moreover, in describing the Japanese experience, Cbeyond neglects to point out that Nippon Telegraph and Telephone Corporation ("NTT") – Japan's largest telecom firm, which is one-third owned by the Japanese government – has criticized the Berkman paper as being "seriously in error regarding numerous aspects of the history and current status of the Japanese broadband marketplace."⁸⁵ In particular, NTT states that "facilities based competition, not unbundling, has been the key spur to broadband growth in Japan."⁸⁶ Other foreign entities have issued similar criticism of the Berkman paper's findings with respect to their home countries.⁸⁷

Finally, Cbeyond argues that further unbundling is required in order to ensure that small businesses have adequate access to high-speed Internet service. But this claim merely exposes the schizophrenic nature of Cbeyond's petition, which simultaneously argues that incumbent LECs have such competitive advantages in serving small businesses that unbundling is required, while also claiming that incumbent LECs are "neglect[ing]" these same customers. In any event,

⁸⁴ See Cbeyond Petition at 23 ("[I]n Japan, the imposition of unbundling requirements, undated to include fiber loops . . . , has played an important role in reducing broadband prices and in establishing the preconditions for competitors' entry and future investment in their own facilities.").

⁸⁵ Comments of Nippon Telegraph and Telephone Corp., *Broadband Study Conducted by the Berkman Center for Internet and Society*, GN Docket No. 09-47, at 3 (FCC filed Nov. 16, 2009).

⁸⁶ *Id.* at 4.

⁸⁷ See, e.g., Comments of France Télécom S.A., *A National Broadband Plan For Our Future*, GN Docket No. 09-47, at 2-3 (FCC filed Nov. 16, 2009) (stating that the report's "section on France is factually incorrect" and that the "European Commission action against France on unbundling in 2002 had zero material impact on the development of the French market"); Comments of New Zealand Institute for the Study of Competition and Regulation Inc., *Broadband Study Conducted by the Berkman Center for Internet and Society*, GN Docket No. 09-47, at 12 (FCC filed Nov. 13, 2009) ("The report is neither accurate nor comprehensive in its summary of the broadband experiences of New Zealand – rather, the very shallow analysis gives a very inaccurate picture and the conclusions drawn from it are unjustifiable and potentially misleading.").

Cbeyond's claim that incumbent LECs are somehow ignoring small business customers is without factual basis. AT&T provides a full range of broadband services to small business customers, including over fiber infrastructure. AT&T's U-verse for Business Service, for example, offers a wide-range of service bundles to small business customers, ranging from 18.0 Mbps download for \$85 per month to 1.5 Mbps download for \$40 per month.⁸⁸ Each plan includes many of the same features that Cbeyond claims are "proven applications that yield unquestioned efficiencies,"⁸⁹ including enhanced security measures, wireless networking, and the option to obtain a static IP address, which offers customers web and mail hosting, additional security, and remote access. AT&T also provides a single Wi-Fi gateway for the office and unlimited use of the AT&T Wi-Fi Basic Network outside of it.⁹⁰ In addition, AT&T offers small business customers a wide range of broadband services over DSL and high-capacity loops.⁹¹ Other incumbents likewise offer a full array of small business services.⁹²

⁸⁸ See AT&T, *Announcing AT&T U-verse for Business*, <http://smallbiz.att.com/businessuverse>; see also AT&T – Media Newsroom, *AT&T Business Solutions Offering Small Businesses 18 Mbps Download Speeds over U-verse Platform in More than 70 Markets*, <http://www.att.com/gen/press-room?pid=4800&cdvn=news&newsarticleid=26412>.

⁸⁹ Cbeyond Petition at 18.

⁹⁰ See Glenn Fleishman, *AT&T Pushes Fiber Service for Small Businesses*, PCWorld (May 13, 2008), http://www.pcworld.com/article/145827/atandt_pushes_fiber_service_for_small_businesses.html.

⁹¹ See, e.g., AT&T, *AT&T Internet Services*, http://businesssales.att.com/products/merch_internet.jhtml?grp=internet.

⁹² See, e.g., Verizon, *Small Business*, <http://smallbusiness.verizon.com>; see also Verizon News Release, *Verizon FiOS Internet for Business Receives SMB Excellence Award From Global Technology Research Firm* (Nov. 12, 2009) ("Verizon FiOS Internet for Business is transforming the SMB communications and information technology marketplace by uniquely offering the kind of high-bandwidth connections that were previously beyond the financial reach of most small businesses."), <http://newscenter.verizon.com/press-releases/verizon/2009/verizon-fios-internet-for.html>.

In short, Cbeyond has not identified a single benefit associated with unbundling other than the fact that it would pay lower rates for transmission. Given the significant costs outlined above, and the absence of any statutory or policy basis for the relief Cbeyond seeks, the Commission should deny Cbeyond's petition.

CONCLUSION

For the foregoing reasons, Cbeyond's petition should be rejected.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "Evan T. Leo", written over a horizontal line.

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